TERRORISM AND STATE ACCOUNTABILITY — THE AVIATION PERSPECTIVE

Ruwantissa Abeyratne*

Abstract: Terrorism, one of the most heinous threats to security, is a multidimensional and immoral evil involving crimes against society. Aviation has proved to be a vulnerable target where any act of terrorism against it attracts global attention towards the terrorist. The destruction of Malaysian Airlines Flight MH17 in July 2014 and Metrojet in October 2015 resonates a regular trend where aviation continues to be susceptible to acts of terrorism. Terrorist acts against aviation destabilise States, threaten to obviate communications between States and unhinge the economic viability of States that depend on tourism. This brings to bear the role of the State as the ultimate organ accountable for protecting people from terrorism on the basis that accountability is the natural progression of responsibility.

This article cuts across the legal obstacle at international law which effectively precludes the holding of States accountable for a breach of responsibility in the face of the dichotomy between State sovereignty and the perceived impotence of international law as a punitive mechanism. It examines international jurisprudence applicable to the accountability of States, with a focus on aviation and highlights the fact that in the context of prevention of threats to national security a new paradigm can be recognised.

Keywords: State sovereignty; State responsibility; terrorism; counter terrorism; aviation security; Tokyo Convention; Hague Convention; Montreal Convention; principles of state accountability

I. Introduction

A. The current problem of terrorism

Change is the defining feature of our times. Information technology and development have changed our world and made our lives easier. However, they have facilitated the work of those who intend to pursue their own agendas even at the expense of human life. There are no longer looming superpowers that breed terrorism. Now, it is weaker States that give rise to evil ambition among groups no longer happy with a decaying status quo. A whole new paradigm is required if modern day terrorism is to be effectively restrained. This requires not mere State responsibility but also

* The author is former Senior Legal Officer of the International Civil Aviation Organization. He is currently President/CEO, Global Aviation Consultancies Inc, and Senior Consultant, Aviation Strategies International.

[(2016) 3:1 JICL 97–125]
a global understanding that States need to be held accountable for preventing the spread of terrorism.¹

In this regard, one of the most vulnerable modes of human interaction and communication is air transport. At the time of writing, the victim of the most recent air transport disaster was the Russian airline Kogalymavia, commonly known as Metrojet, where an aircraft operating an international chartered passenger flight disintegrated above the northern Sinai on 31 October 2015 following its departure from Sharm el-Sheikh International Airport, Egypt, en route to Pulkovo Airport, Saint Petersburg, Russia. The Airbus A321-231, aircraft was reported to have broken up in flight, killing all 217 passengers and seven crew members. Shortly after the crash, the Islamic State of Iraq and the Levant (ISIL)’s Sinai branch, previously known as Ansar Bait al-Maqdis, claimed responsibility for the incident.

Although in 2013 President Obama made a statement to the effect that al-Qaeda, the then most dreaded terror group, which was responsible for the 9/11 attacks, was on the path to defeat the modern face of terrorism is far from extinct. The extraordinary comeback of the jihadists and their allies could be seen in the increasing recruitment campaign of al Shabab and al Qaeda’s own increasing strength in the west of Afghanistan. While the United States is concentrating in its own territory on the so-called lone wolf attacks, the worrying reality that many returning jihadists will take their training and expertise gained in terrorist cells in the Middle East back to their homelands and use terrorism in the west seems to elude most administrations.² That aviation security will be a casualty in this scenario is an incontrovertible reality.

There are many loopholes in State security that have to be plugged if aviation security were to be ensured at a reasonable level. The first is cooperation among States. To give just one example, after the heinous attacks in Paris on 13 November 2015, where attackers killed 130 people, including 89 at a rock concert, where, after the various simultaneous attacks at Paris venues, the terrorists, who had also taken hostages, had wounded 368 people, 80 to 99 seriously, France complained that one of the attackers, who fled to Syria, had been wanted by the Belgian police but no one had forewarned France of this fact. The lack of sharing of security information between countries is a blatant inadequacy in international cooperation,³ prompting the interior ministers of Europe to introduce a renewed measure of share

² See “The New Face of Terror” The Economist 28 September 2013, p.11.
³ The earlier instance of the disappearance of Malaysian Airlines Flight MH370 is a case in point. Both the International Civil Aviation Organization (ICAO) and the International Criminal Police Organization (INTERPOL) failed to advise both States (Malaysia and China — the origin and destination States of the flight) and airlines of the existence of a database at INTERPOL on forged or fraudulent passports. See Ruwantissa Abeyratne, “Integrity of Travel Documents: The Wakeup Call from Flight MH 370” (June 2014) 63 Zeitschrift für Luft-und Weltraumrecht (ZLW) (German Journal of Air and Space Law) 238–249.
within Europe Passenger Name Record (PNR) data for all travellers, in addition to sharing information about inflows and outflows of fighters from their countries into the troubled Middle East, especially Syria.

If these realities are not enough to threaten aviation security, cyber terrorism looms over our heads as a genuine threat which may be used by the terrorist against air transport in the near future. Aviation is a prime target, as it will destabilise States, threaten to obviate communications between States, and threaten the economic viability of States that depend on tourism. As a first step, therefore, attacking Internet and cyber connectivity of terrorist groups becomes a State’s priority. States should imperatively mobilise communities to achieve this objective. Protecting a nation from terrorism therefore becomes a State’s responsibility for which it should be held accountable.

Arguably, the most important factor in terrorism in the context of State accountability today is the Internet and the protection of data which the terrorist can access. Digital warfare is becoming common as the tool for the terrorist to wage psychological warfare. It is reported that the so-called Islamic State relies on the digital sphere with this aim in mind. This brings to bear two major issues: encryption and decryption of data and privacy of the individual. Consequent upon Edward Snowden’s revelations that European data stored by US companies was not safe from surveillance which would be illegal in Europe, the European Court of Justice ruled that the transatlantic Safe Harbour agreement, which lets American companies use a single standard for consumer privacy and data storage in both the US and Europe, is invalid. This decision of the highest court in Europe brought to bear three salient points: (1) individual European countries can now set their own regulation for US companies “handling of citizens” data, vastly complicating the regulatory environment in Europe; (2) countries can choose to suspend the transfer of data to the US, thereby forcing companies to host user data exclusively within the country and (3) the Irish data regulator will examine whether Facebook offered European users adequate data protections, and it may order the suspension of Facebook’s transfer of data from Europe to the United States if so.

The Court held inter alia that the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in art. 8 of the European Convention for

---

5 The Economist of 4 November 2014 speaks of “cyberjacking”, a phenomenon that refers to the equivalent of hijacking an aircraft with the use of cyber technology. This could happen from outside the aircraft or from the inside. The catalyst in this instance is the increasing popularity with passengers of internet connectivity on board for work, games, movies and so on. See generally, Abeyratne, “Aviation Cyber Security: A Constructive Look at the Work of ICAO” (n.1), pp. 25–40.
the Protection of Human Rights and Fundamental Freedoms\footnote{Signed in Rome on 4 November 1950.} and in the general principles of Community law. Therefore, it was held that the approximation of such laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the community.

A related problem to the collection of data and their safe storage is encryption, which various terror groups use in their communications with new recruits. Encryption has caused tangible problems for State security machinery. One example is where the Belgian Interior Minister Jan Jambon claimed just a few days before the Paris attacks of November 2015 that terrorists were communicating through internet gaming consoles.\footnote{“The Terrorist in the Data” The Economist 28 November–4 December 2015, p.20.} Immediately after the Paris attacks of 13 November 2015, senior security officials of Europe advised the press that France’s ability to prevent attacks such as the massacre of November is now challenged by the increasing ability of Islamic State in Iraq and Syria to operate under the radar, as a squad of jihadi cybergeeks train would-be terrorists how to keep their electronic communications secret.\footnote{Josh Meyer, “Are ISIS Geeks Using Phone Apps, Encryption to Spread Terror?” NBC News (16 November 2015), available at http://www.nbcnews.com/storyline/paris-terror-attacks/are-isis-geeks-using-phone-apps-encryption-spread-terror-n464131.}

Security experts have advised States that the threat of encryption could be countered by a four-pronged attack: (1) there should be laws forcing the compliance of technology firms in storing messages their clients send through their devices across networks so that government authorities could enlist the services of their experts in cracking encrypted codes; (2) tech companies should be obligated by law to crack any codes they sell when presented with a court authorised warrant; (3) the selling of computer programmes capable of encryption should be banned if the provider of such programmes cannot break the codes used in such programmes and (4) companies should be required by law to incorporate tools in their programmes where law enforcement authorities can break the codes themselves.

\section*{B. State responsibility and accountability}

The above discussion goes to show that the responsibility of a State in sensibly countering the modern terrorist threat does not lie merely in reacting to the violent means adopted by pockets of cells of terrorists who operate on their own in attacking through sporadic outbursts of violence against groups of citizens gathered together at social events, but also in identifying the enemy and its use of modern technology in spreading psychological warfare. This should be the key criterion in determining State accountability whether prospective or retrospective. An objective evaluation of a State’s accountability in countering terrorism today involves determination whether the State has graduated from merely removing regimes that sponsored terrorism — which was the hallmark of the “war on terrorism” after the events of
Terrorism and State Accountability — The Aviation Perspective

9/11 — towards moving to an approach that strengthens and supports weak regimes that are fighting terrorism.

To place the issue of State accountability in perspective, one must examine the difference between State responsibility and State accountability. The principle of State responsibility is an entrenched concept at customary international law. There were many instances where this principle emerged in 2015: from the claim of the United States that China cannot invoke its State sovereignty over man-made islands in international waters, to Russia’s claim that Turkey was responsible for the shooting down of the former’s fighter aircraft. Arguably, the most compelling example of responsibility without accountability was the acknowledgement of Germany of its responsibility to take in nearly a million refugees, mostly from Syria and Afghanistan, based on art.1 of the German Constitution which ensures that the dignity of the human is untouchable and sacrosanct. However, Germany, or any other country for that matter, did not take concrete action with the rest of the international community on the accountability of those responsible for the plight of the refugees.

With stronger reason, Lebanon, Turkey and Jordan have taken millions of refugees, based on their moral responsibility, but the world has not come together to identify and implement the responsibility of those responsible through concrete punitive measures of accountability.

It is inevitable that in 2016 the international community will graduate from pronouncements of responsibility to the need to enforce accountability. The first step would be to understand the difference between responsibility on the one hand and accountability on the other. Is accountability broader and more stringent than responsibility? The inherent dilemma posed by these two terms is that, often they are used interchangeably by even the most erudite. A common definition of the word “responsibility” is that it is the state or fact of having a duty to deal with something or of having control over someone. The Merriam-Webster Dictionary defines “accountability” as the obligation or willingness to accept responsibility or to account for one’s responsibility for actions. Lisa Yarwood, in her doctoral thesis states: “Thus, accountability does not merely seek to identify the responsible party; accountability seeks to make the responsible party account for its actions. Accountability will ensure the discharge of responsibility, while the reverse does not necessarily apply.”

The above definitions notwithstanding, the enforceability of State responsibility — although a necessary international measure — has to be addressed carefully, particularly in the realm of humanitarian law in the context of terrorism. The shooting down of Malaysian Airlines Flight MH17 in July 2014 over Ukraine by unknown elements brings this danger into focus. One of the greatest dilemmas faced by the modern State is to determine the way in which it could distance itself

---

from terrorist activity that is perceived to be condoned or even supported by the State. The terrorist of today is highly sophisticated in the art of confusing the public and the international community, which often results in fingers being pointed at a sovereign State in terms of responsibility for private acts of terrorism. It therefore becomes necessary to inquire into the principles that identify liability in this area with a view to determining true reprehensibility of perpetrators who often make themselves indistinguishable from both the government and the civilian population within which they function.

Accountability means something more than answerability. It means the removal of impunity of States who seek protection immunity for their reprehensible acts — under the guise of State sovereignty — and of leaders, whether they plunder the wealth of the people or tacitly acquiesce in the spread of terror in their States.12

II. Terrorism and State Responsibility

The author has already discussed extensively the responsibility of a State in broad terms, and in specific terms related to terrorism against civil aviation.13 However, these discussions have been focused on an ex post facto basis of determining State responsibility retrospectively. In this context, it must be mentioned that a State is responsible even for an omission that demonstrated a dereliction of duty towards its people. The United Nations (UN) General Assembly, in its Resolution 56/8314 of December 2001, adopted as its Annex the International Law Commission’s Responsibility of States for Internationally Wrongful Acts which recognises that every internationally wrongful act of a State entails the international responsibility of that State15 and that there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State.16 The discussion herein is aimed at a prospective assessment of State responsibility in the context of what a State could do in implementing preventive measures.

12 It is interesting that between August 2012 and April 2013, the Obama administration repeatedly warned President Assad of Syria against the use of chemical weapons against the protesters (rebels) and civilians, stating that if such weapons were used, Assad would cross a “redline” and be considered totally unacceptable, causing the United States to hold Assad “accountable”. However, the “redline” was crossed and no action was taken by the United States. See Fred Kaplan, “Obama’s Way: The President in Practice” (January/February 2016) Foreign Affairs pp.46–63, 52.
16 Ibid., art.2.
A. Good governance

The primary determinant of a State’s successful prevention of harm to citizens is good governance. Evaluating the quality of governance of a democratically elected regime should not only be a preoccupation of the public sector but should also constitute a necessary prerogative of the people being governed. The most fundamental issue in the evaluation process must inevitably be whether the public governance reforms of a given regime could be assessed with performance measurement tools and models. Traditional modes of evaluation, with which the voter usually goes to the polls in a democratic environment to select her government, are “value for money”, efficiency of service delivery and customer satisfaction. At best, these yardsticks have largely been political and economic abstractions which have prompted some academics and practitioners to consider the subject of governance-evaluation as being immeasurable or too much trouble. The issue is further aggravated by the fact that there is no scientifically approved or accepted model to assess the quality of public governance.

Overall public interest in good governance is now a common feature in the modern State and is not restricted to the academics and practitioners who bore the burden of evaluating governance in the past. The increasing concern and interest in good governance may be attributed to the public being more educated and aware than before, which is now popularly known as “civic literacy”, coupled with the proliferation of complex issues that have emerged with globalisation and an international awareness that has spread to national boundaries. Therefore, an empirical demonstration of good governance has now become a compelling need that could provide the necessary tools for the public to develop their own desired models of governance which are capable of delivering goods that accord with their expectations. In this respect, while admittedly there are various methodologies developed at the local level to assess the quality of life and there exist global review processes such as the one employed by the World Bank to evaluate the quality of governance in whole countries, there are unfortunately no general indicators that could enable better understanding of whether a given governance is improving, nor has any conclusion been reached as to whether evaluating governance could go towards improving governance.

In the 1990s there was widespread interest in the public sector in achieving excellence in service delivery through quality governance. This trend went on the basic assumption that good governance resulted in improving the quality of life of the subject and governing processes. A system of positive reinforcement for the contributor through awards, financial rewards and quality control certification followed and for some time it was widely thought that a combined system of proactive governance and rewarding the contributing public sector would be the way towards progress. However, in recent times, governing bodies have come to realise increasingly that excellence of the public sector is not merely dependent upon the quality of services delivered if governance does not discharge political, social and environmental responsibilities. This new realisation has given rise to the
need for “public governance reforms” to deal with what are administratively termed “wicked problems”. An example of a wicked problem is the funding for public sector education which is often unable to cope with increasing expenditure in the local government sector. In Germany for instance, many public agencies have been compelled to seek innovative approaches to reducing local welfare expenditure. However, recession has made it impossible to contain expenditure in the face of receding local resources. A public governance reform in such an instance could lie in partnerships with the private sector. The most compelling public governance reform would lie in the extent to which a governing body would involve the people, whose role in governance has been unacceptably thin and “consumerist”. As service users, citizens should be consulted and they should, as members of a community, be inextricably linked with the decision-making processes that involve public initiatives.

In many recent instances of changes of government, it has often been seen that even when the voter has noticeably acknowledged improvement of services, he has not necessarily expressed greater trust in the incumbent government unless he had been drawn into the co-planning, co-designing and co-management of public initiatives. Therefore, good governance is dependent on “trust” between the governed and the governing. Another aspect of good governance is the manner in which service is delivered to the governed. Major controversies in most governments around the world have often not been about low service performance but rather about ineptitude or self-interest of the person carrying out the task. Transparency plays a significant role in this area, where complaints are often received by governments about the citizenry not being properly informed of the background of decision-making in given instances, thus exposing the politicians and officials responsible for such decisions, to charges of dishonesty and unfairness.

In early times, governance involved the “Social Contract Theory” in which the parties to the contract were the governing and the governed whereby the latter implicitly undertook to protect and arrange for the overall welfare of the former and the former undertook to accord privileges of governance, pay taxes and so on to the latter. The English philosopher Thomas Hobbes (1588–1679), in his *Leviathan* (1651), attributed great importance to organised society and political power and recognised that human life in the “state of nature” (apart from or before the institution of the civil state) is “solitary, poor, nasty, brutish, and short”, and that it was a “dog eat dog world” where there was a war of all against all. According to Hobbes, this impelled the populace to seek security by entering into a social contract in which each person’s original power is yielded to a sovereign, who then regulates conduct. Hobbes maintained that, under the social contract theory, the sovereign’s power should be unlimited, because the State originated in a so-called social contract, whereby individuals accept a common superior power to protect themselves from their own brutish instincts and to make possible the satisfaction of certain human desires.
At the time of Hobbes, traditional theory and conservative ethics in politics dictated that human beings were essentially evil and needed a strong state or governing body to repress them. This notwithstanding, Hobbes argued that if a sovereign does not provide security and order and is overthrown by the people, they would revert to the state of nature and then may make a new contract. Hobbes’s doctrine concerning the state and the social contract influenced the thought of the English philosopher John Locke, who in his *Two Treatises on Civil Government* (1690), maintained that the purpose of the social contract is to reduce the absolute power of authority and to promote individual liberty. Locke’s theory therefore drew civilisation closer to modern democratic ideals.

The Dutch philosopher Baruch Spinoza, in his major work, *Ethica Ordine Geometrico Demonstrata* (1677; *Ethics Demonstrated in Geometrical Order*), introduced the idea that human reason is the criterion of right conduct deducing ethics from psychology and psychology from metaphysics. While asserting that all things are morally neutral from the point of view of eternity, Spinoza stringently argued that only human needs and interests determine what is considered good and evil, or right and wrong. Carrying this thinking further, Spinoza concluded that whatever aids humanity’s knowledge of nature or is consonant with human reason could be acknowledged as good. Therefore, it is reasonable to suppose that whatever all people have in common is best for everyone, and the good that people should seek for others is the good they desire for themselves. In addition, Spinoza contended, reason is needed in order to keep the passions in check and to achieve pleasure and happiness by avoiding pain.

In comparison with the above philosophies, the modern interpretation of “governance” would take a completely new dimension and be described as the interaction of stakeholders with each other with the goal of influencing the outcome of public policies. Consequently, “good governance” would then be the interaction of the stakeholders taken to the ultimate destination of the implementation and evaluation of their interaction. It has been said that the commencement of good governance is analogous to the design of a violin. If the design is excellent, the violin would turn out to be excellent and produce excellent music. If the violin were to be used in an orchestra, the concert would probably be excellent. However, irrespective of the design and the product, the success of the performance would largely depend on the musician.

Public policy outcomes and interactivity of stakeholders are the two most critical indicators of good government. Public policy outcomes have to be improved if a meaningful result is to be obtained towards good governance. In recent years, the interest of the citizen in public policy outcomes and the resurgence of security consciousness among the public has spurred both politicians and the public to seek evidence of whether their policies have made a difference in terms of achieving desired results. In order to assess good governance, the indicators should be example, in terms of his own security, the citizen would evaluate his government not by the quality of defence services provided but by the level of
security from external attack perceived. In other words, however strong a military a government may provide, if it does not take measures to ensure that its citizenry is not exposed to danger (such as through acrimonious relations with other countries or from groups of individuals within the country), the citizen would not rate the government high in terms of governance. This is even more significant at the local or domestic level, where, however strong and sophisticated the police and crime prevention services may be in a State, if the level of community safety perceived by the citizen is low, the government would be deemed to be neglectful in governance. From an economic perspective, the quality of governance would be evaluated by the level of income and conditions of work rather than the economic development programmes a State may embark upon. Health-wise, the indicator would be the level of health and feeling of well-being enjoyed rather than the quality of health care and social services available. Health is connected to environmental issues, where it is not the environmental protection or improvement services that matter but the quality of environment the people live in.

B. Counter terrorism at international law

In 2006, the UN acknowledged that over 150 of the 191 Member States of the UN have accepted the obligations of the International Covenant on Civil and Political Rights (ICCPR)\(^\text{17}\) to ensure certain rights to all individuals within their territory. A significant provision in the Covenant lies in art.6, from which no member of the UN can derogate, which provides that every human being has the inherent right to life, which is a right protected by the law. The inherent message in this salutary provision is that no one will be arbitrarily deprived of his life:

“To the average person, protecting the right to life means preventing its loss, not punishing those responsible for a successful or attempted deprivation. Protection by law thus demands legal measures to interrupt and interdict preparations for terrorist violence, not merely the identification and punishment of the perpetrators after a fatal event.”\(^\text{18}\)

Foreign involvement, international cooperation and sharing of resources is inextricably linked to national security. President Obama, in his last State of the

\(^{17}\) ICCPR is a multilateral treaty adopted by the UN General Assembly on 16 December 1966, and is in force from 23 March 1976. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. As of April 2014, the Covenant has 74 signatories and 168 parties. The ICCPR is part of the International Bill of Human Rights, along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights (UDHR).

Union address on 12 January 2015 echoed the right tone when he said: “leadership means a wise application of military power, and rallying the world behind causes that are right. It means seeing our foreign assistance as part of our national security, not something separate, not charity”. International cooperation must be intrinsically linked to foresight and prevention of injury. The evolution of the principle in international law, began in the early 1980s although there is evidence that it was domestically popular in Europe in the 1930s in the German socio-legal tradition, centering on the concept of good household management. In German the concept is Vorsorgeprinzip, which translates into English as precautionary principle. One commentator has added the thought-provoking comment that in today’s political sphere, the precautionary principle enjoys a wide, unprecedented recognition: “The precautionary principle has become of such tremendous importance because in many cases, the scientific establishment of cause and effect is a difficult task sometimes approaching a fruitless investigation of infinite series of events.”

For the precautionary principle to apply, States must take measures according to their capabilities and they must be cost effective. Also, threats that are responded to must be both serious and irreversible. The precautionary principle is usually applied through a structured approach to the analysis of risk, which comprises three elements: risk assessment; risk management and risk communication. The principle is particularly relevant to the management of risk. It is based on the presupposition that potentially dangerous effects from a particular process or phenomenon have been identified and that scientific evaluation does not guarantee that the risk could be averted.

There are instances where a State can be defended for invoking preventive action based on the overarching principle of social contract by which the citizens charge the State with the responsibility of ensuring their security. Social contract describes a broad class of philosophical theories whose subject is the implied agreements by which people form nations and maintain social order. Social contract theory provides the rationale behind the historically important notion that legitimate state authority must be derived from the consent of the governed, which, in other words means that a democratic State is precluded from enacting Draconian laws against the civil liberty of citizens unless with the consent of the people. The first modern philosopher to articulate a detailed contract theory was Thomas Hobbes, who has already been referred to in this article, who contended that people in a state of nature ceded their individual rights to create sovereignty, retained by the state, in return for their protection and a more functional society, so social contract evolves out of pragmatic self-interest. Hobbes named the state Leviathan, thus pointing to the artifice involved in the social contract.

20 Ibid., p.6.
Alan Dershowitz, Professor of Law at Harvard University, asserts that “there is a desperate need in the world for a coherent and widely accepted jurisprudence of preemption and prevention, in the context of both self-defence and defense of others”.21

Of course, here Dershowitz is referring to the international scene, but it would not be wrong to ascribe this principle to the national level when there is a dire need to control anarchy and insecurity of a nation. However, the bottom line for any preventive jurisprudence in the domestic context is the social contract theory where State authority must be derived from the people. There must be a preventive jurisprudence in place governing the acts of the executive and law enforcement officers. Preventive acts must never be ad hoc or decided at the whim of the law enforcer.

Preemption and prevention are necessary elements in today’s political and military fabric, where legal legitimacy is ascribed to actions of States which act swiftly to avoid harm and protect its citizenry. This is often accomplished by passing rigid dogma and entrenched rules and based on the precautionary principle and on the maxim necessitat non habet legem (necessity has no law or rules). Another is Inter arma enim silent leges is a maxim attributed to Cicero, which translates as “In times of war, the laws are silent”. In the twenty-first century, this maxim, which was purported to address the growing mob violence and thuggery of Cicero’s time, has taken on a different and a more complex dimension, extending from the idealistic synergy between the executive and the judiciary in instances of civil strife, to the overall power, called “prerogative” or “discretion” of the sovereign to act for the public good and to the role of the judiciary as the guardian of the Rule of Law.

Preventing the arbitrary loss of life is more an issue of implementing preventive strategy rather than the mere adoption of broad policy. An example of such strategy is that of the Department of Homeland Security (DHS) particularly in the realm of aviation security. The requirement of Advance Passenger Information and PNR Data which is calculated to identify high-risk travellers and facilitate legitimate travel, where airlines flying to the United States are required to provide Advance Passenger Information and PNR Data prior to departure is an effective preventive measure.22 Another effective measure is the Visa Security Program (VSP) where the United States deploys trained special agents overseas to high-risk visa activity posts with a view to identifying potential terrorist and criminal threats before they reach the United States.23 DHS has also strengthened its inbound targeting operations in a programme called Pre-Departure Vetting (PDV) in order to identify high-risk travellers who are likely to be inadmissible to the United States and to

22 DHS claims that during 2008 and 2009, PNR helped the United States identify individuals with potential ties to terrorism in more than 3,000 cases, and in fiscal year 2010, approximately one quarter of those individuals who were denied entry to the United States for having ties to terrorism were initially identified through the analysis of PNR. See http://www.dhs.gov/preventing-terrorism-and-enhancing-security.
23 The VSP is currently deployed to 19 posts in 15 countries.
recommend to commercial carriers that those individuals not be permitted to board a commercial aircraft through its pre-departure programme.\textsuperscript{24}

The concept of Secure Flight is yet another proactive and preventive measure which followed the events of 9/11 where the Transportation Security Administration (TSA) prescreens 100 per cent of passengers on flights flying to, from or within the United States against government watch lists before travellers receive their boarding passes. Through Secure Flight, TSA now vets over 14 million passengers weekly. A compelling measure that would protect passengers in flight is Enhanced Explosives Screening where, TSA screens 100 per cent of all checked and carry-on baggage for explosives.\textsuperscript{25}

At the core of the debate is whether it is part of State responsibility to implement a pre-emptive strategy against terrorism and how valid that strategy would be at international law. One of the most vocal arguments against pre-emptive strategy is that such would erode the Westphalian concept of State sovereignty. When an American drone hovered above Pakistan’s Waziristan area one day in March 2011 and unleashed three missiles on a gathering of people, killing 40 persons, most of whom were civilians, questions arose as to whether these drones, which were operated in most instances from the United States, far away from the actual zone of attack by trained personnel operating handheld consoles, violated the fundamental principle of international law — State sovereignty.

The principle of State responsibility with regard to world peace and security lies primarily in art.24 of the UN Charter which calls upon all members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN. Furthermore, art.51 of the Charter\textsuperscript{26} preserves the right of individual or collective self-defence if an armed attack occurs against a member of the UN, notwithstanding any right granted by the Charter that would preclude any Member State from interfering in the affairs of another Member State, particularly with regard to matters of State sovereignty.

\textsuperscript{24} DHS claims that since 2010, over 2,800 passengers have been identified who would likely have been found inadmissible upon arrival to the United States.

\textsuperscript{25} Through the Recovery Act and annual appropriations, TSA has accelerated the deployment of new technologies to detect the next generation of threats, including Advanced Imaging Technology units, Explosive Detection Systems, Explosives Trace Detection units, Advanced Technology X-Ray systems and Bottled Liquid Scanners. See DHS website (n.22).

\textsuperscript{26} Article 51 provides:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”
Although the UN Charter involves action between States, it would not be incorrect to assume that international terrorism, purportedly committed by private individuals, could nonetheless be brought within the preview of the above-mentioned provisions of the UN Charter, particularly from the neo post-modernist approach of collective involvement. This assumption is embodied in recent work of the International Law Commission through art.27 which provides that international responsibility of a State, which is referred to in art.1, is attributable to that State if conduct of the State constitutes a breach of an international obligation of that State. The document also provides that the wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the UN.28 The State responsible for an internationally wrongful act is under an obligation to compensate for damage caused, including reparation for financially assessable damage including loss of profits.29

In addition to State responsibility for conduct attributable to that State, the International Law Commission has established that a crime against the peace and security of mankind entails individual responsibility and in a crime of aggression.30 A further link drawing civil aviation to the realm of international peace and security lies in the Rome Statute of the International Criminal Court, which defines a war crime, inter alia, as intentionally directing attacks against civilian objects; attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objects; employing weapons, projectiles, and material and methods of warfare that cause injury.31 The Statute also defines as a war crime, any act which is intentionally directed at buildings, material, medical units and transport and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.32

The vulnerability of civil aviation against acts of terrorism may be further affected in instances where potential offenders are domiciled in certain States which may avail themselves of “acts of self-defence” by States when threatened. An explicit political interpretation of the role of the UN Charter in this regard was given in 1986 by the then United States Secretary of State George Shultz who said: “The Charter’s restrictions on the use or threat of force in international relations include a specific exception on the right of self-defence. It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace.”33

28 Ibid., art.21.
29 Ibid., art.36.
31 Rome Statute of the International Criminal Court, art.8.2(b)(ii), 8.2(b)(v) and 8.2(b)(xx).
32 Ibid., art.8.2(b)(XXIV).
Terrorism and State Accountability — The Aviation Perspective

The Bush Doctrine, which was based on self-defence, but was later heavily weighted towards pre-emption and prevention, is consonant with this premise. The UN Security Council sanctioned in 2002 the use of force against Iraq as a preventive measure saying thus:

“Whereas Iraq’s demonstrated capability and willingness to use weapons of mass destruction, the high risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself.”

The sustainability of pre-emption and prevention, as an acceptable legal order would largely depend on the balance between the enormity of the threat and the risk undertaken in not taking any action. There have been instances where the international community looked the other way when seemingly perceptible breaches of international law occurred. The ultimate conclusion that one can arrive at, given perspectives of the international community after 9/11 is that, although there are entrenched principles in various instruments specifying circumstances under which intervention and military options may be used and not used, international law has veered in this context from being a set of rules to being a body of principles that comply with and respond to social necessity. As such, although there are inherent and serious risks involved with pre-emption and prevention, they will be regarded as legitimate State practices on a case-by-case basis as long as they do not erode the smooth functioning of the world order.

34 The Bush Doctrine refers to various related foreign policy principles of the 43rd President of the United States, George W Bush. In January 2002, Bush’s foreign policy headed towards one of preventive war. Bush described Iraq, Iran and North Korea as an “axis of evil” that supported terror and sought WMD. He said: “We’ll be deliberate, yet time is not on our side. I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons”. See http://usforeignpolicy.about.com/od/defense/a/The-Bush-Doctrine.htm.
35 Pre-emption in this context is action taken to obviate an imminent threat to security, life and limb, while prevention is action taken to stop an inevitable injury.
37 See Michael N Schmitt, “Pre-emptive Strategies in International Law” (2003) 24 Michigan Journal of International Law 513–548. Schmitt goes on to say: “The attack directly against the Taliban on October 7, 2001 challenged then-existing legal understandings of the quality and quantity of support necessary to attribute an armed attack by a non-State actor to its State sponsor. Yet, there was virtually no condemnation of the U.S. and U.K. strikes because the international community deemed them sensible in the context of 9/11.” (p.547).
III. State Accountability

Accountability is the natural progression of responsibility. However, holding States accountable for a breach of responsibility is a difficult task in the face of the dichotomy between State sovereignty and the perceived impotence of international law as a punitive mechanism. This reason has so far precluded State accountability from being accepted as jus cogens, a peremptory norm of international law. The word “accountability” has not been used often as the word “responsibility” for State actions. However, there is a distinct link between enforcing accountability and the prevention of States from shirking accountability that flows from responsibility.

In UN General Assembly Resolution 64/10 of 2010 which dealt with the Report on the Gaza Conflict between Israel and Palestine, one Whereas clause stresses “the need to ensure accountability for all violations of international humanitarian law and international human rights law in order to prevent impunity, ensure justice, deter further violations and promote peace” and inter alia calls upon the Government of Israel to take all appropriate steps, within a period of three months, to undertake investigations that are independent, credible and in conformity with international standards into the serious violations of international humanitarian and international human rights law reported by the Fact-Finding Mission, towards ensuring accountability and justice.

In the Reparation for Injuries Suffered in the Service of the Nations the International Court of Justice (ICJ) ascribed to the UN the same legal status of an international personality under international law as that of a State, and affirmed that the organisation had the legal right to seek reparation from a State for injuries caused to one of its staff members while on mission in that State.

The Corfu Channel delivered the view of the Court that the legal possibility of imposing liability upon a State wherever an official could be linked to that State encourages a State to be more cautious of its responsibility in controlling those responsible for carrying out tasks for which the State could be ultimately held responsible. In the same context, the responsibility of placing mines was attributed to Albania in the Corfu Channel since the Court attributed to Albania the responsibility, since Albania was known to have knowledge of the placement of mines although it did not know who exactly carried out the act.


41 ICJ Reports, 1949.
When, on 4 December 2001, Israeli military forces attacked Gaza International Airport, destroyed air navigation facilities and bombarded runways and taxiways until the airport became unserviceable, the Palestinian authority claimed that the destroyed airport and air navigation facilities were used for the transportation of civilian passengers, search and rescue operations in case of emergencies, transportation of rescue material, including medical equipment, medicines and survival kits for safeguarding human lives. When the dispute was brought before the International Civil Aviation Organization (ICAO) Council, it adopted a resolution strongly urging Israel to take necessary measures to restore Gaza International Airport so as to allow its reopening as soon as possible, presumably under the notion that Israel was accountable and therefore had to make reparation to Palestine. The ICJ concluded that Israel was accountable in this instance to individuals as well, who suffered injury or damage as a result of the Israeli attack.42

An interesting concept in State accountability is a relatively recent shift from the top-down approach of State accountability, where States brought actions against individuals or other legal persons, to the bottom-up approach where individuals could bring an action against a State seeking its accountability.43 In an interesting case44 where the responsibility of the UN was brought into question, it was held by the European Court of Human Rights that “the United Nations Security Council [(SC)] had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the United Nations”, but the internment of the applicant was attributable to the United Kingdom as it was British troops that had committed the wrongful act in Iraq.45 The court ascribed responsibility to the United Kingdom. When there is involvement by both a State or States and an international organisation (comprised of Member States) such as NATO, courts are inclined to ascribe joint and several liability to both.46 This approach to liability is based on the theory of authority and control where the forces perpetrating an act of military nature are under the control of both the international organisation and the State concerned.

The right of individuals to hold States accountable for injuries or damage suffered is also supported by the International Law Commission.47 So it is with the UN Compensation Commission which was established in 1991 to go into claims of those who suffered from the Iraqi invasion of Kuwait. The claims that the

44 Al-Jedda v United Kingdom, Judgment of 7 July 2011 [2011] ECtHR (Ser 1092), [84].
45 Ibid., [86].
Commission handled amounted to more than 2.6 million and compensation sought under these claims was about $352 billion. Similarly another Commission, the Eritrea–Ethiopia Claims Commission, which was established in 2000 to compensate entities and individuals who claimed that they had suffered from violations of international humanitarian law, addressed issues of State accountability and reparation. The Iran–US claims tribunal is another example where an individual successfully argued that Iran was liable for the acts of intimidation and harassment he suffered under the hands of Iranian citizens which prompted the former to leave Iran, which resulted in significant property loss. However, this decision lost its force when, in a subsequent case the Tribunal required evidence of directives of the Iranian authorities — the Revolutionary Guard — that caused such intimidation to individuals.

Justice in the common law system has been, as already mentioned, retrospective and not preventive, in that a person is incarcerated or otherwise punished for a crime or offence committed and not just for the likelihood of that person committing the crime, however compelling the evidence against that person might be. This is seemingly just and equitable as a person is presumed innocent until proven guilty. However, there are innumerable instances where potential crimes can be identified as imminent and inevitable when authorities are forewarned of a dangerous criminal or terrorist. One such example was that of the so-called “underwear bomber” of Christmas Day 2009 who attempted to detonate a bomb on board an aircraft approaching Detroit airport. It was reported that top US authorities blamed officials at the FBI and the Department of Justice for failing to permit the gathering critical intelligence from Umar Farouk Abdulmutallab, the so-called underwear bomber and that neither Director of National Intelligence Dennis Blair nor FBI director Mueller or Homeland Security head Janet Napolitano were consulted about the information available prior to the incident. The reactive principle of waiting for a crime to be committed was expressly recognised in *Williamson v United States* in 1950. However, as will be discussed later, in air transport a person who is likely to endanger the safety of an aircraft, its passengers and property can be punished.

It is lesser-known fact that a system of preventive justice prevailed as far back as the twelfth century during the reign of Richard I in England where knights of the king were specifically charged with preventing homicides and other crimes by summoning youth and getting them to swear that they would keep away from bad behaviour. The knights were also charged with monitoring the peace so as to ensure that commission of crimes was prevented. Dalton — Justice of the Peace — cited

---

51 184 F2d 280, 282 (2d Cir 1950).
three elements in the conservation of peace: prevention of a breach of the peace; pacifying (or reforming) of offenders and punishing offenders.\textsuperscript{53}

In modern times, the practice of profiling as a preventive tool can be cited as an example. In particular, airport profiling is a good case in point. Airport profiling is very serious business that may concern lives of hundreds if not thousands in any given instance or event. Profiling should therefore be considered justifiable if all its aspects are used in screening passengers at airports. Nationality and ethnicity are valid baseline indicators together with other indicators which may raise a “flag” such as the type of ticket a passenger holds (one way instead of return) and a passenger who travels without any luggage.

Racial profiling, if used at airports, must not be assumptive or subjective. It must be used in an objective and non-discriminatory manner alongside random examinations of non-targeted passengers. All aspects of profiling, including racial and criminal profiling, should as a matter of course be included in the Computer Assisted Passenger Screening System (CAPS) without isolating one from the other. In this context, the now popular system of compliance examination (COMPEX) is a non-threatening, non-discriminatory process which transcends the threshold debate on “profiling” by ensuring a balanced and proper use of profiling in all its aspects by examining “non-targeted” passengers as well as on a random basis.

Principles of accountability are implicitly recognised in the UN Charter. Furthermore, the 1984 Declaration on the Right of Peoples to Peace, approved by General Assembly Resolution 39/11 of 12 November 1984 reaffirmed that the principal aim of the UN is the maintenance of international peace and security, bearing in mind the fundamental principles of international law set forth in the Charter of the UN, expressing the will and the aspirations of all peoples to eradicate war from the life of mankind and, above all, to avert a world-wide nuclear catastrophe. The Resolution also reflected the belief of the UN that life without war serves as the primary international prerequisite for the material well-being, development and progress of countries, and for the full implementation of the rights and fundamental human freedoms proclaimed by the UN.\textsuperscript{54} Article 39 of the UN Charter admits of the ability of the Security Council to determine the existence of any threat to the peace, breach of peace or act of aggression and making recommendations accordingly so that peace can be restored. This provision grants the Security Council a certain indirect jurisdiction to determine liability and

\textsuperscript{53} Ibid., p.45.

\textsuperscript{54} The UN Millennium Declaration (2000–2015) contained in General Assembly Resolution 55/2 of 8 September 2000, recognizes that, in addition to separate responsibilities of States to their individual societies, they have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. States leaders recognised that as leaders, they had a duty therefore to all the world’s people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs. States reaffirmed their commitment to the purposes and principles of the Charter of the UN, which have proved timeless and universal, concluding that their relevance and capacity to inspire have increased, as nations and peoples have become increasingly interconnected and interdependent.
accountability of a State as was seen in the instance of the Iraqi invasion of Kuwait in 1990.\textsuperscript{55} Pursuant to Security Council Resolution 687, the Iraqi Compensation Commission was required to determine compensation payable by Iraq to Kuwait based on a percentage of the value of petroleum exportation, as long as it did not derogate requirements seriously the interests of the Iraqi people. Other types of State accountability have been recognised, such as the payment of compensation by Japan to the “comfort women” of South Korea used by Japanese military forces during World War II\textsuperscript{56} and the accountability of Australia for the stolen generation in the country from 1883 to 1969.\textsuperscript{57} On 11 June 2008, Canadian Prime Minister Stephen Harper delivered a long-anticipated apology to tens of thousands of indigenous people who as children were ripped from their families and sent to boarding schools in Canada, where many were abused as part of official government policy to “kill the Indian in the child”\textsuperscript{58}.

In the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms adopted by General Assembly Resolution 53/144 of 9 December 1998, participating States recognised in art.1 that everyone has the right, individually and in association with others, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels. Article 2 of the Declaration states that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, \textit{inter alia}, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice and to that extent each State is bound to adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the Declaration are effectively guaranteed.

\textsuperscript{55} UNSC Resolution 600 condemned the Iraqi invasion as a breach of international peace and security and called upon Iraq to withdraw its troops from Kuwait. See also Resolution 45/170 on the Situation of Human Rights in Occupied Kuwait and Resolution 46/135 on Situation of Human Rights in Kuwait under Iraqi Occupation. Another example was the banning of flights over Libya in 2011. By Resolution 1973 of 2011, the Security Council imposed a ban on all flights in Libya’s airspace, a no-fly zone, and tightened sanctions on the Gaddafi regime and its supporters. By adopting Resolution 1973 of 2011 the Council authorised Member States, acting nationally or through regional organisations or arrangements, to take all necessary measures to protect civilians under threat of attack in the country, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory—requesting them to immediately inform the Secretary-General of such measures.

\textsuperscript{56} “Saying Sorry for Sex Slavery” \textit{The Economist} 2 January–8 January 2016, p.27.


The underlying principle of State accountability is that the State owes a
duty of care to protect its people from acts of State as well as acts of others. As a
commentator put it:

“The State is responsible not for the direct or indirect connection between
its will and the action of the individual, not for culpable or malicious
intention, but for not having fulfilled the obligation imposed upon it by
international law for having violated a duty towards other States, a duty
consisting in the non-toleration of the fact or in its punishment if it has
occurred.”59

IV. The Aviation Perspective

State functions in aviation are governed by the Convention on International Civil
Aviation (Chicago Convention)60 which lays down several provisions that obligate
States to perform certain functions. For example art.28 calls on each Contracting
State, so far as it may find practicable, to provide airport and air navigation facilities,
in accordance with the standards and practices recommended or established in
pursuance of the Convention. Although this is not an absolute obligation, as the
State is called upon to provide such services only in so far as it finds practicable
to do so, other provisions of the Convention imposes an obligation on States to
seek the assistance of the ICAO Council in the provision of such services,61 as
was the case of Iceland which, in 1947, sought the assistance of the Council of
ICAO when it was evident that Iceland did not have the resources to provide air
navigation services to the proliferation of aircraft flying above the 45th parallel over
its airspace between Europe and North America. The accountability of a State in
the provision of air navigation services was brought to bear in the aftermath of the
shooting down in July 2014 of Malaysian Airlines Flight MH17 over the territory
of Ukraine where an accusation was levelled at the Ukrainian authorities for failing

59 D Anzilotti, Teoria Generale Della Responsabilità Dello Stato Nel Diritto Internazionale (Firenze, 1902)
p.36 (English translation from the original Italian book).
60 Convention on International Civil Aviation signed at Chicago on 7 December 1944. Fifty-two States
signed the Chicago Convention on that day. The Convention came into force on 4 April 1947, on the
thirtieth day after deposit with the Government of the United States. See ICAO Doc 7300/8 (8th ed,
2006).
61 In order to cover an eventuality of a state not being able to provide adequate air navigation services,
the Convention imposes an overall obligation on the Council of ICAO in art.69 to the effect that the
Council shall consult with a State which is not in a position to provide reasonably adequate air navigation
services for the safe, regular, efficient and economical operations of aircraft. Such consultations will
be with a view to finding means by which the situation may be remedied. Article 70 of the Chicago
Convention even allows for a State to conclude an arrangement with the Council regarding the financing
of air navigation facilities and the Council is given the option in art.71 of agreeing to provide, man,
maintain and administer such services at the request of a State.
to close the airspace over Ukraine or failing to advise the aircraft not to fly over the conflict zone under the control of the rebels. A lawsuit filed by German attorney and professor of aviation law Elmar Giemulla blames the Ukrainian Government for not closing its airspace when a conflict was raging.

Another provision in the Chicago Convention is art. 4 whereby each Contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention. In other words, States agree in particular not to use civil aviation as a means to threaten the security of other States. A notable case in this context was the litigation which ensued from the destruction of Pan Am Flight 103 on 21 December 1988 over Lockerbie, Scotland, where Libya in 2003 acknowledged responsibility for the act of terrorism which brought down the aircraft and compensated the families of the victims. The case concerned Libyan nationals who were allegedly responsible for the destruction of the Pan Am aircraft and the demand of Libya that it extradite the Libyan nationals who had sought refuge in their country. The UN Security Council had, on the 31st of March 1992, and acting under Ch.VII of the Charter, adopted Resolution 748 after Libya was called upon to extradite the individuals concerned or suffer sanctions. This decision was based on the supremacy of the Security Council over any treaty, on an interpretation of art.25 of the UN Charter, since the Libyan authorities sought solace under the Montreal Convention of 1971 which, the Libyans claimed, supported their position, that they had no obligation to extradite the suspected Libyans to the United States. The case before the ICJ brought to bear the jurisdictions of both the Security Council and the ICJ in determining State accountability. Judge Shahabuddeen, recognised that there is no superior authority to that of the Security Council, added in his opinion

62 See works referred to in note 38.
65 Chapter VII of the Charter sets out the UN Security Council’s powers to maintain peace. It allows the Council to determine the existence of any threat to the peace, breach of the peace or act of aggression and to take military and non-military action to restore international peace and security.
66 Resolution 738 resolved that as from 15 April 1992, all Member States should:

“(a) deny permission of Libyan aircraft to take off from, land in or overfly their territory if it has taken off from Libyan territory, excluding humanitarian need; (b) prohibit the supply of aircraft or aircraft components or the provision or servicing of aircraft or aircraft components; (c) prohibit the provision of weapons, ammunition or other military equipment to Libya and technical advice or training; (d) withdraw officials present in Libya that advise the Libyan authorities on military matters; (e) significantly reduce diplomatic and consular personnel in Libya; (f) prevent the operation of all Libyan Airlines offices; (g) deny or expel Libyan nationals involved in terrorist activities in other states.”
67 Article 25 stipulates that Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the Charter.
that treaty obligations can be overridden by a decision of the Security Council’s sanctions. Judge Bedjaoui stringently maintained that there were two aspects to the problem between Libya and the United States on this issue — political and judicial. In his view, although it was not possible for the Court to override the Security Council Resolution, the Court was by no means precluded from declaring provisional measures, as applied for by Libya, even if such a declaration by the Court was rendered destitute of effect by the Security Council Resolution. Judge Weeramantry, concurring with Judge Bedjaoui, conceded that although art.25 of the UN Charter required Member States of the UN to accept and carry out decisions of the Security Council, the Court was not deprived of its jurisdiction in issuing provisional measures as applied for by Libya. Adding that the ICJ and the Security Council were created by the same Charter to fulfil the common purposes and principles of the UN, Judge Weeramantry concluded that the two agencies are complementary to each other, each performing a special role assigned to it.

The two organs, The Security Council and the ICJ, have jurisdiction over the determination of State accountability in accordance with aviation security Conventions: the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963), the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970) and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1971). Of these the Tokyo Convention of 1963 was the first step towards enforcing State obligations. It is a basic obligation of a State to co-operate with other States in order to ensure the safety of international civil aviation. The Tokyo Convention provides in art.11 that Contracting States have certain obligations whenever a person on board an aircraft has unlawfully committed by force or threat thereof an act of interference, seize or other wrongful exercise of control. The question of whether a particular act is lawful or unlawful is to be judged by the law of the State of registration of the aircraft or the law of the State in whose airspace the aircraft may be in flight. Paragraph 1 of art.11 imposes on All Contracting States the obligation, by virtue of Paragraph 1 of art.11 to take appropriate measures to restore or to preserve the commander’s control of the aircraft. The words “appropriate measures” are intended to mean only those things which it is feasible for a Contracting State to do and also only those which it is lawful for a Contracting State to do. This ties the accountability of a State to its sphere and scope of responsibility. For instance, a Contracting State, which is situated thousands of miles away from the scene of the

71 Ibid., pp.155–156.
72 Convention on Offences and Certain Other Acts Committed on Board Aircraft, Signed at Tokyo, on 14 September 1963. See ICAO Doc 8364.
hijacking, is not under any obligation to take any action, because it would not be feasible for it do so.

Another obligation is imposed by the Tokyo Convention through art.12 which is a corollary to arts 6 and 8 of the Convention. The latter two articles authorise the aircraft commander to disembark any person who has committed, or is about to commit, an act of the type described in art.I of the Convention. Article 12 obligates a Contracting State to allow the commander of an aircraft registered in another Contracting State to disembark the alleged offender. Article 12 of the Convention provides that any Contracting State is required to allow the commander of an aircraft registered in another Contracting State to disembark any person pursuant to art.8, para.1. This makes it unequivocal that the obligation of a Contracting State to permit disembarkation of a hijacker, at the request of the aircraft commander, is an unqualified obligation.

The obligation of a Contracting State to take delivery of a person from the aircraft commander is addressed in art.13 of the Convention. This provision should be contrasted with the authority of the aircraft commander to disembark. The obligation of the Contracting State under this article is a corollary to the authority given to the aircraft commander under arts6, 7 and 9.

Paragraph 1 of art.13 states the primary unqualified obligation of each Contracting State to “take delivery”. Paragraph 2 addresses the obligation of a Contracting State, after having taken delivery, to take custody. It provides that the Contracting State is under an obligation to take “custody” only if it is satisfied that the circumstances so warrant such action. Thus, the State is left free to judge for itself whether the act is of such a nature as to warrant such action on its part and whether it would be consistent with its law since under para.2 any such custody is to be affected only pursuant to the law of the State taking custody. However, such custody may only be continued for that period of time which is reasonably necessary to enable criminal proceedings to be brought by the State taking custody, or for extradition proceedings to be instituted by another interested or affected State. On the other hand, art.13(3) provides that any person taken into custody must be given assistance in communicating immediately with the nearest appropriate representative of the State of which he is a national.

Extradition is an important element when discussing State accountability. Offences committed on aircraft registered in a Contracting State are to be treated, for the purpose of extradition, as if they had been not only in the place where the offence has occurred, but also in the territory of the State of registration of the aircraft.76 Without prejudice to this provision it is declared that “nothing in this Convention shall be deemed to create an obligation to grant extradition”. It must be noted that the Tokyo Convention does not obligate a State to punish an alleged offender upon his disembarkation or delivery. Curiously, it is incumbent upon the landing State to set him free and let him proceed to the destination of his choice.

76 Tokyo Convention (n.72), art.16.
as soon as is practicable if it does not wish to extradite or prosecute him. It is only treaties between State parties that oblige States to extradite the offenders, exclusively under provisions of other treaties between them.77

Notwithstanding the above, States themselves have done a disservice to their powers and duties under the Tokyo Convention which leaves gaps in the instrument that would stultify the ICJ if a case were to be brought before the court that involved the Convention. There is no machinery of mandatory extradition if prosecution was not conducted was considered a major set-back of the Tokyo Convention. However, the above loopholes from which the Convention severely suffers are not the only ones.

Looking for the vantage point today, it is obvious that the Tokyo Convention left major gaps in the international legal system in attempting to cope with the scope of aircraft hijacking. There was no undertaking by anyone to make aircraft hijacking a crime under its national law, no undertaking to see to it the crime was one punishable by severe penalties and most important, no undertaking to either submit the case for prosecution or to extradite the offender to a State which would wish to prosecute.

Under the Tokyo Convention, all States parties to the Convention undertake to permit disembarkation of any person when the commander considers that it is necessary to protect the safety of the flight or for the maintenance of good order and discipline on board. States also commit themselves to take delivery of any person the commander reasonably believes has committed a serious offence on board. In this case, when they have taken delivery, States concerned must make an immediate inquiry into the facts of the matter and report the findings to both the State of Registration and to the State of which the person is a national. Where the State considers the circumstances warrant such action, it shall take custodial or other measures, in accordance with its laws, to ensure that the person delivered to it remains available while the inquiry is conducted. Such measures may be continued for a reasonable time to permit criminal or extradition proceedings to be instituted when such proceedings follow from the inquiry.

Although the Convention is unequivocal in providing clearly that all Contracting States should ensure their legal competence in respect of aircraft on their register, thus addressing jurisdictional issues with regard to crimes on bound aircraft, there are a number of lapses in the Convention which make it open for criticism. The Convention does not apply to “aircraft used in military, customs or police services”. This is a topical issue which requires clarity, as in modern exigencies of airlines, there are instances when civilian aircraft are called upon to carry military personnel or supplies, as much as military aircraft are sometimes deployed to execute civilian flights.

77 DY Chung, Some Legal Aspects of Aircraft Hijacking in International Law, University of Tennessee, Doctoral Dissertation 1976, p.150.
Problems concerning registration, particularly over when the Convention insists on registration as a pivotal issue may also change the circumstances, although commanders could be totally ignorant of the laws of the State in which the aircraft they are flying is registered. The commander may be required to determine whether a certain action on his aircraft does in fact constitute a crime and more particularly, a serious crime. Since at most, a commander may have some familiarity with the laws of the State of the operator. The United Kingdom, has elected to incorporate the terms of the Convention into its domestic legislation, thereby widening its scope to cover any aircraft controlled by its own nationals.

The Hague Convention of 1970, in art.4 requires a Contracting State to take measures to establish jurisdiction over offences and acts of violence committed against passengers in certain circumstances. The requirement to try an offender if a State does not extradite him or her to a State vested with jurisdiction (such as the state of nationality of the offender) is in art.7 of the Convention. The Montreal Convention of 1971 has the same requirement regarding extradition in the case the offender is not tried in the country of offence in its art.7 as well. Both the Hague Convention, in its art.11, and the Montreal Convention, in its art.13, impose the requirement on a State in which an offence is committed, to report to the Council of ICAO as promptly as possible relevant information regarding the circumstances of the offence; action taken; and measures taken in relation to the offender or the alleged offender. The Chicago Convention imposes on the Council of ICAO, as a mandatory function of the Council, to consider any matter relating to the Convention which any Contracting State refers to it.78

In this context, it is worthy of note that two distinct provisions of the Chicago Convention pertaining to accountability are found in arts 87 and 88 where the former states that each Contracting State undertakes not to allow the operation of an airline of a Contracting State through the airspace above its territory if the Council has decided that the airline concerned is not conforming to a final decision rendered in accordance with art.86.79 Article 88 provides that the ICAO Assembly is authorised to suspend the voting power in the Assembly and in the Council of any Contracting State that is found in default under the provisions of the chapter of the Convention in which arts 87 and 88 are contained.

The Montreal Convention of 199180 imposes an obligation on each State party to take necessary measures to exercise strict and effective control over

78 Chicago Convention (n.60), art.54(n). It is debatable whether the word “report” in the Hague and Montreal Conventions could be construed as synonymous with the word “refers” in the Chicago Convention. Arguably, this would be a matter left to the discretion and decision of the Council of ICAO.

79 Article 86 provides that unless the Council decides otherwise any decision by the Council on whether an international airline is operating in conformity with the provisions of this Convention shall remain in effect unless reversed on appeal. On any other matter, decisions of the Council will be, if appealed from, be suspended until the appeal is decided. The decisions of the Permanent Court of International Justice and of an arbitral tribunal shall be final and binding.

the possession and transfer of possession of unmarked explosives which have been manufactured in or brought into its territory.\textsuperscript{81} It must be noted that, in the preambular clauses reference is made to other means of transport and targets other than aircraft, indicating that the scope of this Convention is clearly wider than the civil aviation sector. Article II expresses the obligation of States to take the necessary and effective measures to prohibit and prevent the manufacture in their territories of unmarked explosives, while art.III formulates the same obligation towards the movement into or out of the territory of a State party of unmarked explosives.

It is noteworthy, that arts II and III simply refer to “necessary and effective measures” to be taken by States as a fulfilment of their obligations. It will be left to the individual States and their national legislation to provide for the necessary prohibitions and sanctions. While these provisions may facilitate the ratification of the Convention, they probably will not contribute greatly to a uniform and strict approach to the problem of containment and destruction of unmarked explosives.

The Diplomatic Conference on Aviation Security held from 30 August to 10 September 2010 in Beijing adopted the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation\textsuperscript{82} and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft. The distinctive feature of the Beijing Convention is that it bases itself on responding to new and emergent threats to security. The Convention identifies six offences against civil aviation, but what stands out is one which no other treaty on unlawful interference with civil aviation addresses. Article 1(d) of the Convention provides that an offence is committed when a person destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight.

This undoubtedly refers, \textit{inter alia} to cyber terrorism, but strangely links the offence exclusively to the safety of aircraft in flight. If therefore as a result of an act of cyber terrorism, a taxying aircraft collides with an aircraft which has opened its doors for disembarkation but the passengers are still on board awaiting disembarkation, that act would not be considered an offence in terms of the passengers in the process of disembarkation. In other words, the offender would not be committing an offence either against the second aircraft or its disembarking passengers.

\textsuperscript{81} \textit{Ibid.}, art.IV.
\textsuperscript{82} Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, done at Beijing on 10 September 2010.
V. Conclusion

It must be pointed out that, although there are two Annexes to the Chicago Convention, Annex 9 (Facilitation) and Annex 17 (Security), which have various Standards and Recommended Practices (SARPs) calculated to direct Contracting States towards preventing terrorism and acts of unlawful interference with civil aviation, none of the SARPs contained in the two Annexes has the legal effect of holding States accountable for non-adherence to them, as SARPs are subject to art.38 of the Chicago Convention which specifies that Contracting States, if they are unable to comply with SARPs, may merely advise ICAO of the fact.83

The issue of State accountability in aviation therefore falls within the purview of treaty law and practice and, boils down to a determination of accountability of States for non-compliance with provisions of the treaty to which they are contracting parties. A State party becomes a contracting party because it has, by ratifying a treaty, given its consent to be bound by it. This ascribes to a Contracting State accountability for adherence. The fact that a Contracting State has the right to record its reservation to a particular provision of a treaty it otherwise ratifies (unless the treaty expressly prohibits the recording of reservations)85 is an indicator that a Contracting State is answerable and accountable if it does not adhere to a treaty or provision thereof which it has ratified without reservations.

The basic principle of State accountability is that States cannot observe treaty obligations, or any particular treaty obligation only when it is in their interest to do so.87 With regard to reparation as a consequence of State accountability, the International Law Commission, in its Draft Articles on State Responsibility, provides that the State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. Such compensation would cover any financially

83 Article 38 provides *inter alia* that any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to ICAO of the differences between its own practice and that established by the international standard.
84 A treaty is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. See Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, No 18232, 1155 UN Treaty Series 331, art.2(1)(a).
85 A reservation to a treaty is a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty. Vienna Convention, *ibid.*, art.2(1)(d).
86 In recent years several multilateral conventions of importance have included provisions that prohibit the marking of reservations to provisions therein. One reason given is that such a provision is necessary because treaties are legislative in character and effect.
assessable damage including loss of profits insofar as it is established.\textsuperscript{88} This provision is deemed applicable only to instances where States found accountable for their wrongful act do not rectify the wrong with restitution. This principle has had judicial approval of the ICJ which has said that there is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.\textsuperscript{89} The International Law Commission goes on to recommend that the State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. Satisfaction would not be out of proportion to the injury and may not take a form humiliating to the responsible State.\textsuperscript{90}

There has been a trend to obfuscate the legal legitimacy of State accountability by the misconceived use of the concept of State sovereignty. However, in the context of prevention of threats to national security, a new paradigm can be recognised. The supremacy of State sovereignty now lies in State responsibility and international cooperation aimed at ensuring the safety and security as well as the general welfare of the people, rather than State prerogative. As the then Secretary General of the UN said in 1999: “State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalization and international cooperation”. States are now widely understood to be instruments at the services of their peoples and not \textit{vice versa}.\textsuperscript{91}

\textsuperscript{88} See International Law Commission, \textit{Draft Articles on Responsibility of States for Internationally Wrongful Acts} (n.15), art.36.

\textsuperscript{89} In a dispute between Hungary and Slovakia over the construction and operation of dams on the river Danube, which found both States in breach of their legal obligations, the ICJ called on both countries to carry out the relevant treaty between them while taking account of the factual situation that has developed since 1989. See http://www.icj-cij.org/docket/index.php?pr=267&p1=3&p2=1&case=92&p3=6.


\textsuperscript{91} Kofi A Annan, “The Two Concepts of Sovereignty”, \textit{The Economist}, 18 September 1999.